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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term - 1985

ARTHUR A. SMITH and MICHAEL J. LOPEZ, individually, and doing business as SHARP-EYE ENTERPRISES, a partnership,

Petitioners,

-vs-

GOLDEN WEST BROADCASTERS, INC., a California Corporation, STAN CHAMBERS, LEW ROTHBART, and LAWRENCE McCORMICK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

This case involves a news-feature television broadcast which included portions of a videotaped interview of plaintiffs, and the circumstances relative to that interview. The telecast

was highly critical of the plaintiffs' business, and unfairly impugned the plaintiffs' integrity and abilities. Plaintiffs sought legal redress. Their lawsuit against the television station and agents was eventually terminated by summary judgment granted to defendants.

Petitioners, plaintiffs below, ask review of the trial court's Summary Judgment, the California Appellate Court's affirmation thereof and the California Supreme Court's denial of hearing in the case.

Thus, the following questions are here presented for review:

1. May the media, in assertion of its First Amendment rights, present a news-feature telecast, with malice, and ostensibly as media opinion, that ridicules and defames private citizens who are not involved in any public

controversy nor any matters of public interest, for the purpose of improving the station's ratings?

2. Does the United States Constitution authorize fraud and deception by a Television Station in obtaining and broadcasting a video interview of ordinary citizens, that invades such citizens' privacy, where the Television Station concealed their secret intention to use the interview to degrade and ridicule such individuals and their business, for the purpose of improving the station's ratings?

3. Did the trial and appellate courts of the State of California, by Summary Judgment proceedings, Summary Judgment, and affirmation thereof, deny the plaintiffs due process of law and their right to a jury determination of their several causes of action, notwithstanding the existence of genuine

issues of fact?

4. Were plaintiffs denied equal protection of the law by the California Courts' Summary Judgment proceedings, Summary Judgment, and affirmation thereof, in disregard of established law and precident?

PARTIES

All parties to the proceedings herein are named in the caption to this Petition for Writ of Certiorari.

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REFERENCE TO OPINIONS, DECISIONS AND JUDGMENTS OF THE LOWER COURTS.

The Trial Court's Ruling on the Motion for Summary Judgment, is set forth hereininafter as Appendix "A". The Trial Court's Order Granting Summary Judgment is set forth hereinafter as Appendix "B". The Trial Court's rulings under California Code of Civil Procedure, §591 and §592 are set forth hereinafter as Appendix "C". The Trial Court's Summary Judgment is set forth in full as Appendix "D". The Opinion of the Court of Appeal, Second Appellate District of California, is set forth in full as Appendix "E". The Notice from the California Supreme Court, denying hearing to review that decision, is attached hereto as Appendix "F". The transcript of the audio portion of the defamatory broadcast that is the subject of this Petition is set forth in full as Appendix "G".

GROUNDS UPON WHICH JURISDICTION IS INVOKED

Summary Judgment was entered by the Trial Court on June 21, 1983. The decision of the Court of Appeal, 2d Appellate District of the State of California, was entered on October 12, 1984. A timely Petition for Hearing before the Supreme Court of the State of California was filed, and the same was denied on January 2, 1985. This Petition is filed within ninety-days from said date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the United States Constitution

Fifth Amendment to the United States Constitution

Seventh Amendment to the United States Constitution

Fourteenth amendment to the United States Constitution

The pertinent portions of the texts of the foregoing Constitutional Provisions are set forth by Appendix "H".

STATEMENT OF THE CASE

I. Nature of the Action:

This is an action for Intentional Interference With Economic Advantage, Invasion of Privacy, Slander, Libel, and Intentional Infliction of Emotional Distress. The Trial Court granted defendants' Motion for Summary Judgment, as to all causes of action, and plaintiffs appeal.

Plaintiffs, ARTHUR A. SMITH and MICHAEL J. LOPEZ, were advertising craftsmen, with expertise in photography, who had quit their employment in 1977 to go into business for themselves.

Defendant, GOLDEN WEST BROADCASTERS,

INC., is the owner of KTLA, a Television Station at Channel 5 in Los Angeles, California. Defendant LEW ROTHBART was a television Programing Director, defendant STAN CHAMBERS a television Reporter, and defendant LARRY McCORMICK a television news broadcaster. All of the individual defendants were employed by defendant GOLDEN WEST BROADCASTERS, INC. at the time of the events of this lawsuit, and were involved in the subject broadcast.

This action arises out of a "Moneywatch" segment of a television program, which included portions of a taped interview with the plaintiffs, and the circumstances and representations of the defendants to plaintiffs, relative to that taped interview.

II. Proceedings to Date:

Plaintiffs filed their Complaint herein on June 19, 1978 (CT 1), and defendants filed their Answer on Septem-

ber 5, 1978 (CT 17). Discovery was had by the parties and the case was thereafter set for trial by Jury in 1983.

Defendants brought their Motion for Summary Judgment on March 7, 1983. The Motion was decided on the declarations of the parties, excerpts from depositions, and a videotape of the subject broadcast which was lodged with the Court as its Exhibit 1 (CT 251) and viewed by the trial Judge. Summary Judgment was denied on June 7, 1983, but the Court held that the telecast "represents protected opinion of the broadcaster", and ordered "summary adjudication" accordingly, specifically eschewing findings "either way about any remaining issues of fact" (Appendix "A", pg 2). Thereafter, an "Order Granting Summary Adjudication" was entered, which held that the subject broadcast was a "statement of opinion protected from liability by the United

States and California Constitutions" (CT 258-259) (Appendix "B").

On June 17, 1983, the Presiding Judge of the Trial Court granted defendants' Motion to Dismiss under California Code of Civil Procedure, §591 and §592, that authorize dismissal when no issue is presented for trial, and thereafter, on June 21, 1983, "grant[ed] Summary Judgment in favor of defendants and against plaintiffs as to all causes of action", on his finding that "there remain no triable issues of fact". (Appendix "D")

Plaintiffs brought their appeal for review of the lower Court's rulings and the Summary Judgment thus entered. The Court of Appeal, Second Appellate District, Division Two, affirmed the rulings and Judgment of the lower Court by its Opinion of October 12, 1984 (Appendix "E").

Plaintiffs petitioned for hearing to the California Supreme Court for review the Court of Appeal's Opinion and the rulings and Judgment of the lower Court, again raising the United States Constitutional questions at bar, which Petition was denied on January 2, 1985 (Appendix "F").

Both parties, in their Briefs at all stages of these proceedings, dealt with the Federal Constitutional questions here at issue.

III. Summary of Material Facts.

(Note: This Summary of Material Facts is drawn from the papers filed with the Trial Court, and contained within its Clerk's Transcript (CT), including excerpts from the plaintiffs' Declarations and Defendants' Depositions. Particularly pertinent statements from defendants' Depositions are set forth in footnotes and by reference to specific

sections of the Clerk's Transcript.)

Plaintiffs were photographers and artisans with experience and expertise in photographing and inventoring advertising display items. They quit their employment and formed their partnership business under the name of "Sharp-Eye Enterprises", in the fall of 1977 (CT 213; 217). That business offered to take a detailed inventory, and photograph all furniture, fixtures and valuables in private homes and businesses, in place, and to indefinitely store copies of such inventories and photographs, for the purpose of securing such property against loss by fire, theft or other events, and to facilitate investigations and the filing of insurance claims in the event of such losses (CT 206). Plaintiffs purchased special photographic equipment and supplies, distributed brochures, press releases, price lists and other

advertising matter, all preparatory to beginning such business in the latter part of 1977 (CT 217).

Plaintiffs sought publicity from the media and others, and accordingly, received a response from defendant Golden West Broadcasters, Inc. (CT 18-19).

Plaintiff LOPEZ discussed the business with defendant ROTHBART, Program Director of defendant Golden West Broadcasters, Inc., and sent him literature, including a price list, that defined the services to be performed by plaintiffs, and the cost factors involved in pricing their services (CT 212; 214).

Defendants then sent their reporter, defendant Stan Chambers, together with his camera crew, to interview the plaintiffs in November, 1977. The interview was later edited to delete the factors involved in the services to be performed, which would justify the charges to be

made by the plaintiffs for their services, and the truncated interview was then utilized in the "Moneywatch" segment here at issue (CT 194-196).

Prior to the interview, defendants had decided to broadcast a segment of their newscast devoted to the plaintiffs' business, and critical of that business that would be adverse publicity for plaintiffs.[1] This plan was concealed from the plaintiffs, who were unaware of the intended use of their names and photographic likeness, and of the "edited" interview version to be used,

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[1] "Q. When did you first know that they (defendants) intended to do a story that the (plaintiffs') services was too expensive? A. Before we did the story. Q....before or after your interview...A. Before." (Chambers Deposition, CT 192 lns 8-22); "Your belief...was that if you told Mr. Lopez you were going to have a program critical of his charges, he would not consent to the program, wasn't it? The Witness: Yes." (Rothbart Deposition, CT 180 lns 1-13; 184 lns 14-18)

until they viewed the broadcast itself.[2]

The broadcast was aired on the "Moneywatch" segment of defendants' television station, Channel 5, on November 29, 1977, a week or so after the interview of the plaintiffs (Smith Declaration, CT 207 lns 2-4). By direct accusation and clear inference, the broadcast falsely accused plaintiffs of "gouging" the public, and impugned plaintiffs' honest, integrity, business ethics and abilities. It ridiculed and mocked the plaintiffs and exposed them to contempt and obloquy. It was intended

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[2] "Did you at any time when you... interview[ed] Mr. Art Smith...warn him that there was going to be an editorial...that would adversely show their business in a bad light? A. No." (Chambers Deposition, CT 194-195; "Q...Did you believe at that time [before interview] that Mr. Lopez...and Sharp Eye Enterprises -- was going into this enterprise to get exposure and publicity?...A. Yes." (Rothbart Deposition, CT 177 lns 1-21; 178 lns 2-13).

to, and did, injure them in their trade, occupation and business (CT 208, 209, 216, 217)

The televised broadcast further included overlays from time to time, at one point showing plaintiff SMITH's image with the name "Sharp-Eye Ent." below it, after defendant McCORMICK had falsely stated "that's not really their name". In another portion of the program, defendants placed a table overlay showing:

Your Cost	Their Fee
$10	$105

A copy of the subject broadcast, viewed by the trial Court and lodged as Court's Exhibit 1, was viewed by the Court of Appeal. That Court of Appeal pointed out that "...in determining whether an alleged defamatory statement is an actionable false statement of fact or constitutionally protected opinion, the test requires the court to examine

the statement in the totality in which it was uttered or published."

Therefore, plaintiff will lodge a true copy of said videotape with this Honorable Court, pursuant to Rule 32 of this Court.

Plaintiffs suffered the loss of their business and business investment, humiliation, diminished reputation, loss of employment and earnings, and mental and emotional distress from defendants' broadcast, and they seek their special, general, and punitive damages by this action (CT 208; 216;217).

Other pertinent facts are set forth in the Argument section of this brief.

ARGUMENT

I. SUBJECT DEFAMATORY BROADCAST NOT ABSOLUTELY PRIVILEGED UNDER FIRST AMENDMENT

A. Broadcast defamatory per se.

Plaintiffs present their defamatory action as both libel and slander, from the broadcast itself and from the printed text and cue-cards publicly displayed.

California statutory definition of Libel includes any "false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obliquy or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation" (California Civil Code §45).

Slander includes any "false and unprivileged publication, orally uttered and also communications by radio or any

mechanical or other means which:... 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;..." (or) "5. Which, by natural consequence, causes actual damage." (California Civil Code §46).

Viewing and hearing the subject broadcast in its entirety will lead this Court to conclude that the broadcast, at the very least, infers that the plaintiffs were intentionally "gouging" the public, and were unethical and dishonest in their business practices. Such inferences have always been held to be actionable defamation (Wilson v.

Stockholders Publishing Co. 4 C.2d 724; Patton v. Royal Ind. (1968) 263 C.A.2d 760; 70 C.R. 44), and the California Supreme Court has held that:

> "The code definition of libel is very broad and has been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation."
>
> Maidman v. Jewish Pub., (1960) 54 C.2d 651; 7 C.R. 617

Plaintiffs' Declarations set forth their expertise, expenses and other factors that show cost and reasonable value of their services, including some 8 hours of their time on each $105.00 service plan (CT 207-208). Such expense and cost factors, as more particularly detailed in the Statement of Material

Facts hereof, on page 8, were discussed by plaintiff Smith in his interview that become a part of the broadcast. However, it was those factors that were deleted from the interview and not included in the broadcast (CT 207, ln 17 to 208, ln 10).

While we urge this Honorable Court to view the videotape of the televised segment in its entirety, which we will lodge with the Court, we wish to note several passages which give rise to such defamatory inferences. Reference is made to the statement by defendant McCormick that plaintiffs "are asking what we consider to be way too much for it in monetary return. They want you and me to pay, or actually overpay--we might as well say it, about 10 times the value of this service" (Appendix G, pg 26), "...we don't want to knock anybody, any company, out of any loot, but..." (Appendix G, pg

29), as well as repeated reference to the plaintiffs' charges as a "whopping $105"(Appendix G, pgs 28, 29).

Plaintiffs were clearly defamed and ridiculed by the broadcast.

B. Broadcast not Protected Opinion.

The California trial and Appellate Courts here noted that generally, "the critical determination of whether the alleged defamatory statement constitutes facts or protected opinion, is a question of law", and cite Gregory v. McDonnell Douglas Corporation (1976) 17 C.3d 596. But they did not address the test for determining whether a particular statement should be held to be fact, or protected opinion.

In Gregory, supra, the California Supreme Court noted that the distinction between actionable fact and protected opinion is:

"...frequently a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another." (Emphasis added)

Gregory, in turn, relied upon this Court's holding in Greenbelt v. Bresler, (1970) 398 U.S. 6, for that premises.

No case has developed that "context" with any particularity. However, the cases that apply a liberal construction to the language involved, to find the publication to be "protected opinion", are cases where the parties are (1) public officials (New York Times v. Sullivan, (1964) 376 U.S. 254; Good Government Group v. Superior Court, (1978) 22 C.3d 672; 150 C.R. 258:), or (2) public figures (Curtis Publishing Co. v. Butts, (1967) 388 U.S. 130; Greenbelt v. Bresler, supra; Kaufman v. Fidelity

Fed. Sav. & Loan Ass'n, (1983) 140 C.A.3d 913, 189 C.R. 818), or (3) statements made in the context of a heated labor dispute (Lynn v. Plant Guard Workers (1966) 383 U.S. 53; Gregory v. McDonnell, etc., supra), or (4) statements made in a public debate or other setting, where strident, vigorous language would not be expected to be literally interpreted (Yorty v. Chandler, (1970) 13 C.A.3d 467; 91 C.R. 709).

No case, other than this case, has held that such broad liberal interpretation of language, to find "protected opinion", should be given to a libel of a private individual, where matters of public interest are not involved, or where the setting is such as to indicate that the language used would be likely to be believed in a defamatory sense.

Here, plaintiffs were attempting to start their own business. Defendants'

television news program's ratings were unsatisfactory.[3] Their news feature segments were intended to help increase that rating.[4]

Accordingly, they used the plaintiffs by first interviewing them, then editing that interview so that it could be utilized as part of a news feature criticizing plaintiff's business,[5] without regard to its effect on plaintiffs' business.

In any event, where there is any doubt as to whether the defamatory

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[3] "Q. Do you know (what)...the news program's ratings were? A. They were unsatisfactory." (Chambers Deposition, CT 197 lns 18, 19, 24).

[4] "A. It was my intent to make all segments of the newscast help increase the rating, not just the one (here involved). Q. But that would be one? A. That would be one of many." (Chambers Deposition, CT 198).

[5] "Q. What is your opinion as you viewed the script as to the effect on this (plaintiffs' business). A. Minimal adverse." (Rothbart Deposition, CT 188-191); See also footnote 1.

language should be construed as actionable libel or, protected opinion, the California Supreme Court, in Good Government Group v. Seal Beach, supra, has held that such ambiguity should be left to jury determination. The publication at bar is actionable defamation on its face. But if it could be construed as ambiguous, then the question of its interpretation should have been left to a jural determination, not decided in a summary judgment proceeding.

C. Trial Court did not consider plaintiffs' exposure to contempt, ridicule and obliquy.

Libel includes the holding up of an individual to contempt, ridicule and obliquy in California, as above noted. No consideration was given as to the affect of this television broadcast on

the plaintiffs in that regard. The California Courts disposed of the entire case by its sole determination that the broadcast was Constitutionally protected opinion. But lost in the Court's summary judgment of this case, is any consideration of the obvious ridicule of the plaintiffs by that "media-opinion", and the broadcast as viewed in its entirety. No case has held that the Constitution may be used to protect one who exposes another to humiliation for the crass commercial purposes of the defendants in this case. California Courts, by a long line of cases, have upheld the rights of its citizens to be free of such scurrilous attacks made in violation of that segment of Civil Code §45 above quoted (Newby v. Times Mirror Co. 46 C.A. 110; and at 173 C. 387).

II. DEFENDANTS' MONEYWATCH SEGMENT NOT CONSTITUTIONALLY PROTECTED INVASION OF PRIVACY.

A. Invasion of plaintiffs' right to Privacy not proper subject for summary judgment determination.

The California Constitution, Article 1, §1, provides for a right of privacy. In determining the scope of this Constitutionality protected right, both State and Federal Courts have considered the competing rights of the freedom of speech and freedom of press guaranteed by the First Amendment of the United States Constitution. In balancing these competing rights, the United States Court of Appeal for the Ninth Circuit, in Virgil v. Time, Inc., (1975) 527 F.2d 1122, noting first that respect for privacy is not only of personal interest, but also one of concern to society as a whole (footnote 7, page 1128) held that

"Liability may be imposed for an invasion of privacy only if 'the matter publicized is of a kind which * * * is not of ligitimate concern to the public.'" (@ 1129). The Court then correlated this "legitimate concern of the public" to "Newsworthiness".

Invasion of Privacy causes of action generally exist where there is (1) Public Disclosure of Private Facts (Briscoe v. Readers Digest, etc. (1971) 4 C.3d 529; 93 C.R. 866); (2) Intrusion into Private Affairs (Rest.2d Torts, §625B); (3) Commercial Use of Pictures (Rest., Torts §867; 26 S.C.L.Rev. 313); (4) Commercial Use of Name (Fairfield v. American Photocopy, Inc. (1955) 138 C.A.2d 82; 291 P.2d 194); (5) Noncommercial Use of Photograph (Gill v. Curtis Publishing Co., (1952) 38 C.2d 273; (6) Use of Name or Photograph for Advertising (Civil Code, §3344).

In the instant case, plaintiffs were not engaged in any matter of public interest, and they were not "newsworthy" in any sense of that term. Yet they were interviewed, and the interview, as edited, was used as part of a demeaning and ridiculing television broadcast. Defendants have urged that plaintiffs "consented" to the interview. But that consent was obtained by fraud. Defendants concealed from plaintiffs their true intention to use the interview in a news feature highly critical of the plaintiffs' business. And to justify that criticism, deleted the exculpatory matter from the interview, including the factors upon which plaintiffs based their fees.[6]

[6] "Q. Do you recall if there was part of the interview that discussed the pricing that was cut out? A. I believe we talked about costs. Q. So that part was cut out? A. Yes, I believe so. It seems to me, that that was a lot of the discussion that we had. I'm sure it was on film." (Chambers Deposition, CT 196; See also Smith Declaration, CT 207-208)

Defendant Rothbart even admitted that the plaintiffs would probably not have given the interview had they known the true nature of its use[7], and that the effect of the broadcast would be adverse to the plaintiff's business.

In these circumstances, defendants assert their Constitutional right to free speech and freedom of press, to justify their invasion of plaintiffs' privacy by their broadcasting of an interview obtained by fraud and deception, edited and utilized to ridicule and humiliate the plaintiffs, in pursuit of the objective of the station to increase its ratings.

Such abuse of the media's First Amendment rights should not be condoned in this case, or under any other similar

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[7] See Footnote 1.

circumstances.

B. Invasion of Privacy not subject to Constitutionally protected opinion defense.

This Honorable Court has noted that the right of privacy primarily involves mental distress, from having been exposed to public view, and that the published matter need not be defamatory on its face, or otherwise. It might even be laudatory, but that the use of another's name, portrait or picture without his consent may still warrant recovery (Time, Inc. v. Hill (1967) 385 U.S. 374, 87 S.Ct. 534).

Therefore, the determination of whether published matter is fact or opinion is not relevant to a cause of action for Invasion of Privacy. Yet, in the instant case, plaintiffs' invasion of right of privacy count, together with all other counts, was disposed of by the

single, sole finding that the broadcast was "constitutionally protected opinion".

It should be noted, that this Court, in Time v. Hill, supra, further affirmed the established principle that "Calculated falsehood enjoys no immunity under the constitutional guaranties of free speech and press, either in the case of alleged defamation of a public official's official conduct or in the case of alleged invasion of a newsworthy person's right of privacy."

III. CALIFORNIA COURTS DENIED PLAINTIFFS DUE PROCESS OF LAW BY GRANTING OF SUMMARY JUDGMENT.

A. Summary Judgment improper as to defamatory causes of action.

In weighing the evidence in a summary jdugment proceeding, the trial Court is obliged to weigh the evidence in the light most favorable to the party

resisting the Motion, giving the resisting party the benefit of any inferences tending to deny the motion.

> "The (California) summary judgment procedure provided by Code of Civil Procedure, §437(c) is drastic and should be used with caution, in order that it may not become a substitute for existing methods of determining issues of facts."
>
> Coleman v. Fitzgerald, (1967) 252 C.A.2d 58; 60 C.R. 173

The declarations that defendants submitted did not resolve the issues of fact to which they were addressed, but endorsed, for the most part, the contested issues of this case, to be determined by the trier of facts. In the final analysis, the trial Court viewed and heard a videotape of the subject

broadcast, and determined therefrom, in error, only that the subject broadcast was a Constitutionally privileged expression of opinion (Appendix "A"). Plaintiffs contend that the Court should have held the broadcast to be actionable defamation, as a matter of law, but at least that the broadcast was uncertain in this respect, and therefore a matter for jury determination (Bindrim v. Mitchell, (1979) 92 C.A.3d 61; 155 C.R. 29). Thus, the summary judgment of this case denied plaintiffs a jury trial of their defamatory actions, in denial of their Fifth, Seventh and Fourteenth Amendment rights.

B. Summary Judgment improper as to all remaining causes of action.

The California Courts held in effect, that the subject broadcast, and any and all conduct in connection

therewith was constitutionally protected, regardless of what other torts were involved. There was no holding that the other causes of action of plaintiffs' Complaint rested solely upon the statements which the Trial Court held to be protected opinion rather than actionable statements of fact. Such remaining counts did not solely rely upon that premise. The effect of the Trial Court's ruling in this case, as affirmed by the Appellate Courts, is a precident for the premises that the expression of protected opinion serves as an umbrella to protect the media rendering that opinion, from any and all torts that it may concurrently, successively, or inclusively commit in their broadcast of that opinion. No justification is found for that premise. Plaintiff's Complaint stated causes of action for Invasion of Privacy, Interference with Prospective

Economic Gain, and Intentional Infliction of Emotional Distress, all recognized torts in California and in most jurisdictions. No demurrer was made to the Complaint; each cause of action was answered, and the matter was set for trial by jury for June 17, 1983. The Summary Judgment Motion filed sought Summary Judgment as to each cause of action, and response was made to all such contentions. Yet, the trial Court entirely ignored that facet of the lawsuit here at issue, in its summary judgment proceedings, and all of the rulings, orders and Summary Judgment made pursuant thereto.

Such ruling thus denied and deprived each of the plaintiffs a jury trial on the merits as to each of the torts for which they sought redress. Further, plaintiffs were denied any determination whatsoever on all but the defamation

causes, as the California Courts simply refused to act on the remaining causes of action of plaintiffs' Complaint.

Plaintiffs were thus deprived of due process and equal protection of the law, as guaranteed by the United States Constitution, Fifth, Seventh and Fourteenth Amendments, and the California Constitution, Article 1, §7 and §16.

California Courts have always held that the discretion of the lower Court, in a summary judgment proceeding, extends only to the determination of whether or not an issue of fact exists as to any of the causes of action involved, and does not involve the determination of any issue of fact, as the office of the summary judgment is to ferret out facts, not resolve them (Reeder Lathing Co. v. Allen, (1976) 66 C.2d 373; 57b C.R. 841).

Here, the lower Court did not so act, but to the contrary, as noted above.

IV. CALIFORNIA COURTS DENIED PLAINTIFFS THE EQUAL PROTECTION OF THE LAW.

The instant case is the only case known to petitioners where the reasonable inferences of a publication are ignored and defamation action denied without consideration of such inferences. Thus, plaintiffs have been denied equal protection of the law, in that in every other such case, inferences much weaker than those here have been held to be defamatory, where here, the obvious inferences are ignored. In Patton v. Royal Industries, Inc., supra, for example, the publication before the Court was that the plaintiff's "had been terminated", and that they were being replaced with personnel having "more experience and knowledge" in the service involved. As the California Courts there decided, the foregoing clearly impugnes

the professional ability of the plaintiffs, and was therefore defamatory per se.

Next, California Courts have also consistently held that any defamatory language concerning one's occupation is actionable, and such rule has been continuously applied by an unbroken line of cases. In Slaughter v.Friedson, (1982) 32 C.3d 149, 185 C.R. 244, the statement was made that a dentist was charging excessive fees and performing unnecessary services. The California Appellate Courts had no trouble finding such statement defamatory.

Here, plaintiffs were accused with charging "Way too much", "10 times the value", "a whopping $105", but no mention is made by the California Courts as to the obvious defamatory impact of such statements.

And the California Courts, in Good Government Group v. Superior Court, supra, held that the character of statements which may be construed as either statements of fact or statements of opinion, must be determined by a jury, not in summary judgment proceedings. In this case, plaintiffs were denied their right to determination by jury as to such construction.

CONCLUSION

Certiorari is sought in this case because the plaintiffs, private citizens, have been defamed and have had their privacy invaded, by an ever growing, ever more powerful media, that now excercises its power with arrogance, and seeks the protection of the United States Constitution for its false, malicious attack upon the plaintiffs' reputation and business. Such arrogance was

candidly shown by defendant Rothbart when he testified at his deposition:

> "Q. Did it occur to you when you read Larry McCormick's final draft of the program, that in the exercise of fair play and the exercise of fairness to the person who was giving you the interview, that you should tell them that you were going to be critical of their costs? Did you have that belief?...
>
> A. No." (CT 181, lns 1-14)

And further:

> "Q. Do you believe in the exercise of fairness to an individual, that it is proper to take an interview of an individual, when he thinks he's going to get exposure, then secretely harbor an intention to be critical of his costs on the program that you finally air?...
>
> A. Yes." (CT 181, ln 18 to 182 ln 4)

This, under circumstances where the media orchestrated and edited an interview of the plaintiffs for defamatory inference,[8] to justify their attack upon the plaintiffs, for the purpose of improving their ratings, and for their monetary gain that would inevitably flow from such improved ratings.

This Court is asked to reaffirm the limits of Freedom of Speech and Freedom of Press as identified in New York Times v. Sullivan, supra, and in Gertz v. Welch, (1974) 418 U.S. 323.

> "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the

---

[8] Such distortion of truth for defamatory effect may be evidence of malice, in the context of the New York Times v. Sullivan doctrine (Carson v. Allied News, (1976) 529 F.2d 206; Goldwater v. Ginsburg (1969) 414 F. 324).

careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues [Citing New York Times v. Sullivan]."

DATED: March 29, 1985

Respectfully submitted,

Jacque Boyle

JACQUE BOYLE
Attorney for Petitioners

APPENDIX "A"

UPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPT. 84

ate: June 7, 1983

ONORABLE IRVING A. SHIMER, Judge

J. SCHUMUKI, Deputy Clerk

..

244 685

RTHUR A. SMITH, et al

.

OLDEN WEST BROADCASTERS,
NC., et al

ATURE OF PROCEEDINGS.

Motion of Defendants, Golden West roadcasters, Inc., Stan Chambers, Lew othbart and Lawrence McCormick, for ummary judgment

This matter was submitted on May 3, 983, the court now rules as follows:

The Court had announced his decision n substance, that the subject telecast

insofar as the text presented was concerned, constituted opinion within the meaning of Gregory v. McDonnell Douglas (1976) 17 C 3d 596 or fair comment within the holding of Rollenhagen v. City of Orange (1981) 116 C.A. 3d 414. Counsel for plaintiffs objected on the ground that the broadcast itself itself (sic) differed from the "script" provided and the court agreed to and thereafter did view a tape of what (sic) was alleged to be the broadcast. There were modest differences between the script and the film. This court rules therefore that the subject telecast represents protected opinion of the broadcaster, and summary adjudication is ordered accordingly. Summary judgment is denied however, not because there remains any issue of fact, but only because the motion was heard within 45 days of the scheduled trial date and there is an unpleasant and

potentially inflammatory dispute about the circumstances and scheduling between counsel, which muddy the legal waters. No finding is made either way about any remaining issues of fact.

Copy of this minute order mailed to both counsel, which constitutes notice.

Carton containing a tape of subject broadcast marked as Court's Exhibit 1.

MINUTES ENTERED

June 7, 1983

COUNTY CLERK

NOTE: Three dots (...) denote portions of Court forms not applicable to this action and are not included.

APPENDIX "B"

"...

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ARTHUR A. SMITH and MICHAEL J. LOPEZ, Individually, and doing business as SHARP-EYE ENTERPRISES, a partnership,	No. 244 685
Plaintiffs and Appellants,	ORDER GRANTING SUMMARY ADJUDICATION
v.	
GOLDEN WEST BROADCASTERS, INC., a California corporation, STAN CHAMBERS, LEW ROTHBART, and LAWRENCE McCORMICK,	
Defendants and Respondents.	

The motion of defendants Golden West Broadcasters, Lew Rothbart, Stan Chambers and Larry McCormick for summary judgment was filed on March 7, 1983 and heard on March 22, 1983, April 13, 1983 and May 3, 1983, with Jacque Boyle, Attorney for Plaintiffs and Amy D. Hogue, Attorney for Defendants, appearing before this Court.

After full consideration of moving and responding papers, a videotape

cassette of the subject broadcast and oral argument of counsel, it appears and the Court finds that the matters stated below are without substantial controversy, and that the Defendants have shown such matters to be without substantial controversy by admissible evidence and reasonable inferences from that evidence.

IT IS, THEREFORE, ORDERED that the following matters be deemed established in favor of Defendants and against Plaintiffs at the trial of this action, or on final disposition of the action by this Court:

1. The entire KTLA broadcast of "Moneywatch" aired on November 29, 1977 is a statement of opinion protected from liability by the United States and California Constitutions."

DATED: JUN 15 1983

/s/ Irving A. Shimer
Judge of the Superior Court
IRVING A. SHIMER"

APPENDIX "C"

" IN DEPARTMENT ONE OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JURY
9:00 A.M.
Date: June 17, 1983 M. MATHERS, Clerk

HONORABLE THOS. T. JOHNSON
...

SMITH, ARTHUR, A-ET AL...
J Boyle-J Pd $137

GOLDEN WEST BRDCAST INC.-ETC-
ET AL A.D. Hogue

Length of Trial: 08 Days
Memo: Sep 18 1978

NATURE OF PROCEEDINGS:

INTERFERENCE WITH PROSPECTIVE ECONMIC ADVANTAGE, INVASION OF PRIVACY

TRIAL: Off Calendar

...

[X] Motion for Judgment pursuant to 591 and 592 CCP [X] Granted

...

Counsel for Defendant to prepare Judgment and submit it to the Court for signature.

☒ Defendant to give notice

MINUTES ENTERED

June 17, 1983

County Clerk"

NOTE: Three dots (...) denote portions of Court form not applicable to this action, and are not included.

APPENDIX "D"

"...

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ARTHUR A. SMITH and MICHAEL J. LOPEZ, Individually, and doing business as SHARP-EYE ENTERPRISES, a partnership,	No. 244 685
Plaintiffs and Appellants,	JUDGMENT IN FAVOR OF DEFENDANTS
v.	
GOLDEN WEST BROADCASTERS, INC., a California corporation, STAN CHAMBERS, LEW ROTHBART, and LAWRENCE McCORMICK,	
Defendants and Respondents.	

Having fully considered the Orders of Summary Adjudication of Judge Irving A. Shimer of June 7, 1983 and June 15, 1983 and the oral arguments of counsel, and good cause appearing therefor, the Court finds that Plaintiffs' action has no merit and that there remain no triable issues of fact. The Court, therefore grants summary judgment in favor of Defendants and against Plaintiffs as to

all causes of action.

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Defendants and against Plaintiffs.

DATED: June 21, 1983

/s/ Thomas T. Johnson
THOMAS T. JOHNSON
Judge, Superior Court

APPENDIX "E"

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION TWO

ARTHUR A. SMITH and MICHAEL J. LOPEZ, Individually, and doing business as SHARP-EYE ENTERPRISES, a partnership,	No. BO03076 (Super.Ct. No.C244685)
Plaintiffs and Appellants,	FILED OCT 12 1984
v.	
GOLDEN WEST BROADCASTERS, INC., a California corporation, STAN CHAMBERS, LEW ROTHBART, and LAWRENCE McCORMICK,	
Defendants and Respondents.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas T. Johnson, Judge. Affirmed.

Jacque Boyle, for Plaintiffs and Appellants.

Lillick, McHose & Charles, Kenneth E. Kulzick and Amy D. Hogue, for Defendants and Respondents.

NATURE OF APPEAL:

Respondent was granted a summary judgment against a complaint stating numerous causes of action including slander and libel arising out of a television consumer news report concerning appellant's photo inventory business. The trial court based its summary judgment on its holding that the broadcast contained only constitutionally privileged opinion. We affirm.

STATEMENT OF FACTS AND PROCEDURE:

On November 30, 1977, respondent Larry McCormick, a reporter for respondent Golden West Broadcasters, aired a review of appellant's photo inventory business on the "Moneywatch" segment of respondent's newscast. Appellants formed a partnership named "Sharp-Eye Enterprises" in the fall of 1977. Appellants intended to photograph property in

private homes and businesses for the purpose of inventorying the property to facilitate police investigations and the filing of insurance claims in the event of loss of the property. Appellants sought publicity for their business. Respondent, pursuant to appellants' request, agreed to interview appellants. Respondent Stan Chambers, another reporter for Golden West Broadcasters, did interview appellants and his interview plus a script prepared by Lew Rothbart were the basis of the segment aired by respondent Larry McCormick. Videotape of that segment was supplied to this court and we have viewed it. The segment was critical of appellants' service. Reporter McCormick stated: "This is a kind of case where somebody came up with a very good idea but in this instance they are asking what we consider to be way too much for it in monetary return. They

want you and me to pay, or actually over pay -- we might as well say it, about ten times the value of this service." McCormick went on to state that the basic service for photographing the contents of a person's home was priced at $105. Along with the photographs, the customer would receive a written inventory of the items and a separate copy of the photographs of the list would be kept in a secure place. McCormick stated that the same job could be done for less than $10 by the homeowner himself. McCormick also stated that: "here on Moneywatch we always try to save you money in those areas where a little of your own elbow grease and a little work on your part could save you some money and instead of paying somebody else a whopping fee for it, we don't want to knock anybody, any company, out of any loot, but when you can do it yourself and save, that's what

we are here for on Moneywatch -- tonight has been one example."

ISSUE:

Was the segment telecast on Moneywatch an expression of opinion protected from liability by the United States or California Constitutions? Does a cause of action for invasion of privacy survive a finding of protected opinion?

DISCUSSION:

I.

The broadcast in question was a statement of opinion and is protected.

Appellants characterize the alleged defamation by respondents as both libel and slander. "An essential element of libel...is that the publication in question must contain a false statement of fact.... This requirement...is constitutionally based. The reason for

the rule, well stated by the high court, is that 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.' (Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 339-340....) In this context courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse. [¶] The critical determination of whether the allegedly defamatory statement constitutes fact or opinion is a question of law." (Gregory v. McDonnell Douglas Corp. (1976) 17 Cal.3d 596, 600-601; Okun v. Superior Court (1981) 29 Cal.3d 442, 450, cert. den., Maple Properties v. Superior Court (1981) 454

U.S. 1099.)

Appellants characterize the broadcast as containing innuendoes of dishonesty on the part of Sharp-Eye Enterprises "which [have] a tendency to injure [them] in [there] (sic) occupation." (Civ. Code, §45.) Appellants seize on words such as "way too much" and "they want you...to pay or actually overpay -- we might as well say it," "Now enter a company known as Sharp-Eye Enterprises -- that's not really the name," the word "loot", and, finally, a "whopping $105" as carrying a factual implication that they were attempting to cheat the public in offering their service. Appellants take these words out of context. It is well settled that in determining whether an allegedly defamatory statement is an actionable false statement of fact or constitutionally protected opinion, the test requires the court to examine the

statement in the totality in which it was uttered or published. (Information Control v. Genesis One Computer Corp. (9th cir.) (1980) 611 F.2d 781, 784.) "[W]hat constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole." Okun v. Superior Court, supra, 29 Cal.3d 442, 450.) The court must consider all the words, not merely a phrase or sentence. We must give weight to any cautionary terms used by the individual publishing the statement. The medium used to communicate this statement and the audience communicated to must also be considered. (Information Control v. Genesis One Computer, Inc., supra 611 F.2d at p. 784.) We have viewed the videotape of the segment in question and although the segment is certainly

critical of the prices to be charged by appellants for their services, respondents uttered only their opinion. Respondents stated at the outset that appellants had a "very good idea" but that after examining their idea and listening to them describe their services, "we considered" the price charged to be way too much. In other words, it is the opinion of the station after having described the services to be performed by appellants that the amount charged is much more than the services would be worth to anyone taking the minimal amount of time and effort required to perform the function for themselves. Respondents do not state or even imply that appellants are attempting to deceive or cheat the public. Respondents ended the broadcast with a statement that their viewers could save themselves money by applying a little of

their own elbow grease and work. Again, this is merely a statement of opinion, that the service being supplied by appellants can be accomplished for far less by the individual homeowner.

The only statement made by respondent which can be characterized as a statement of fact rather than opinion is the statement that the individual homeowner can accomplish the service being offered by appellants for less than $10 as opposed to the $105 appellants wished to charge. Appellants rely on the case of Slaughter v. Friedman (1982) 32 Cal.3d 149 in which letters from the director of a private insurance company accused the plaintiff, an oral surgeon, of charging excessive fees and performing unnecessary work. The Supreme Court stated that: "[a]lthough accusations of excessive 'fees' or 'unnecessary' work when made by laymen might indeed constitute mere

opinion, similar accusations by professional dental plan administrators carry a ring of authenticity and reasonably might be understood as being based on fact. As we recently generalized, 'Where...the allegedly libelous remarks could have been understood by the average reader in either sense, the issue must be left to the jury's determination. [Citation.]' [Citation.]" (Id. at p. 154.) Appellants contend that likewise the statements of the television station carry a ring of authenticity and reasonably might be understood as being based on fact. However, the Supreme Court stated "[S]uch accusations, if false and unprivileged, would be actionable tending, as they do, to injure plaintiff professionally." (Ibid.) The only statement of fact made by respondent is that a person who already owned a camera could purchase film, take pictures of his home, have

them developed and create an inventory list for less than $10 in cash and some "elbow grease" or work on his own part. In order for this statement of fact to be actionable, it must be false. Appellants nowhere allege that this statement is false. Appellants merely allege that certain costs involved in their providing the service result in their charge of $105 being fair. The remainder of the statements made by respondent are merely expressions of opinion that, regardless of what costs appellants must incur to provide their service, the resulting charge is too high considering the minimum of effort that the homeowner would be required to expend to provide himself the same service.

II.

Appellants next contend that if the broadcast consisted of protected opinion precluding a cause of action for

defamation, the remaining causes of action in their complaint would nevertheless be viable. However, appellants go on to concede in their reply brief that should the remaining torts rest solely on the defamatory publication held to be privileged opinion, only the tort of invasion of privacy would survive. Appellants then contend that the related tort counts do not rest solely on the privileged defamation. We agree with the trial court that all of the causes of action alleged rest solely on the protected opinion.

However, since causes of action under the rubric of invasion of privacy can survive where a cause of action for defamation must fail, we proceed to an analysis of these torts. In their opening brief, appellants refer to a "full constellation of invasion of

privacy actions" that they claim exist in this case. The invasion of privacy torts listed are public disclosure of private facts, intrusion into private affairs, commercial use of pictures, commercial use of names, noncommercial use of photograph, use of name of photograph for advertising and portraying plaintiffs in a false light. Appellants sought the interview with respondent and consented to its broadcast. They did everything possible to place their activity in the public eye. The fact that appellants would not have consented to the broadcast had they known that the station would be critical of their business does not vitiate the waiver given by their consent. (Smith v. National Broadcasting Co. (1956) 138 Cal.App.2d 807.) A plaintiff had reported a missing panther to the police causing a local uproar. Three months later the story was

broadcast as a "Dragnet" television show. The court held that by making a police report, the plaintiff had given up his right to privacy with respect to the panther story. Similarly, appellants sought publicity for their business and consented to the broadcast of a segment concerning their business thereby giving up the right of privacy in the activities that were the subject of the broadcast.

The judgment of the trial court is affirmed.

NOT FOR PUBLICATION.

/s/ Beach, J.

We concur:

/s/ Compton, ACTING P.J.

/s/ Gates, J.

APPENDIX "F"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JAN 2 1985

I have this day filed Order

HEARING DENIED

In re: 2 CIV. *No.* B003076

ARTHUR A. SMITH AND MICHAEL J. LOPEZ ET AL.,

vs.

GOLDEN WEST BROADCASTERS, INC., ET AL.

Respectfully,

Clerk

84 32943

APPENDIX "G"

The text of the subject broadcast is as follows:

By defendant McCORMICK: "This is kind of a case where somebody came up with a very good idea, but in this instance they're asking what we consider to be way too much for it in monetary return. They want you and me to pay, or actually overpay--we might as well say it--about 10 times the value of this service. The idea is photographing your household belongings for insurance and security purposes. There's no question the concept is very good. The Insurance Companies are in favor of it; so, for that matter, are the police. Now enter a company known as "Sharp-Eye Enterprises"--that's not really their name. They offer to come into your home and take one roll of slides; that's a

total of 36 pictures. Along with that, they provide a written inventory of all of the items photographed. But remember, that's just an inventory. It is not an appraisal. Included in this package are four window stickers saying your house has been inventoried, which theoretically will discourage burglars."

(The segment next shows a portion of the taped interview with plaintiff SMITH)

SMITH: "Well, the need for our services involves helping people protect their personal belongings in the event of a loss. Fire, earthquake, burglary, that sort of thing."

Question by Interviewer: "What are some of things that you do for them and what does it cost?"

Plaintiff SMITH: "Well, what we are attempting to do, we have--we offer, 5 different basic packages, the first being a photo package which involves

documenting personal property which belongs to the homeowner so that he can show his insurance company what items have been stolen, and it also aids him in retrieving every possible dollar that's due him in the event of a loss." (End of interview with plaintiff SMITH. The segment continues with defendant McCORMICK and miscellaneous backgrounds.) "I can see how it might be helpful to you, I don't see how it could discourage a burglar. The charge for the basic service or plan one is a whopping $105.00. Now let's compare. Assuming you already have a camera of almost any kind. If you buy the film, take the pictures yourself, have them developed and make up your own inventory list, you could do the same job for less than $10.00. That's quite a contrast to the $105.00 this company is asking for it. They also offer other plans as well, each

of them succeedingly more expensive, ranging all the way up to $800.00. In most cases, you could do the job yourself at just a fraction of the cost. They do offer one, what we consider to be truly unique service, a videotape recording of your homesite and belongings which could, for example, better show any nearby fire hazards. Again, the basic idea is good. Take pictures of the values itemed (sic) in your home, make up a written list, and keep them in a safe deposit box or someplace that's fireproof. And finally, some good advice anytime--inasmuch as here on Moneywatch we always try to save you money in those areas where a little of your own elbow grease and a little work on your own part could save you some money instead of paying somebody else a whopping fee for it, we don't want to knock anybody, any company, out of any loot, but when you can do it yourself and

save, that's what we are here for on Moneywatch--tonight has been one example."

APPENDIX "H"

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent portions of the United States Constitutional provisions pertaining to the questions raised by this action are as follows:

Amendment 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 5: "No person shall be ... deprived of life, liberty, or property, without the due process of law..."

Amendment 7: "In Suits at common law, where the value in controversy shall

exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment 14: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws...."

PROOF OF SERVICE BY MAIL

JACQUE BOYLE, declares and states:

That I am a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action and my business address is 333 South Grand Avenue, Suite 4220, Los Angeles, California 90071. On March 29, 1985 I served the within Petition for Writ of Certiorari to the Supreme Court of the State of California, on each of the interested parties in said action, by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

LILLICK, McHOSE & CHARLES
KENNETH E. KULZICK
AMY D. HOGUE
707 Wilshire Boulevard, 45th Floor
Los Angeles, California 90017

HONORABLE IRVING A. SHIMER
Judge of the Superior Court
111 North Hill Street
Los Angeles, CA 90012

HONORABLE THOMAS T. JOHNSON
Judge of the Superior Court
111 North Hill Street
Los Angeles, CA 90012

OFFICE OF THE CLERK
SUPREME COURT OF CALIFORNIA
4050 State Building
350 McAllister Street
San Francisco, CA 94102

OFFICE OF THE CLERK
COURT OF APPEAL
2nd Appellate District
3580 Wilshire Blvd., Room 301
Los Angeles, California 90010

I declare under penalty of perjury, that the foregoing is true and correct.

Executed March 29, 1985 at Los Angeles, California.

Jacque Boyle

JACQUE BOYLE, Declarant